LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 20 1958
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 323

ROY FELLOM, JR., LEONIE H. FELLOM, NEAL A. FELLOM,
Plaintiffs and Appellants,
vs.
REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH L. ALIOTO, Chairman, CITY AND COUNTY OF SAN FRANCISCO, DOE ONE, DOE TWO,
Defendants and Appellees.

Appeal from the District Court of Appeal, First Appellate District, Division One, State of California.

STATEMENT AS TO JURISDICTION.

NEAL A. FELLOM,
1651 Church Street,
San Francisco 14, California,
In Propria Persona.

Subject Index

	Page
Opinion below	1
Jurisdiction	2
Statutory provisions conferring jurisdiction of the appeal on this court	3
Cases believed to sustain the jurisdiction	5
The state statute, the validity of which is involved	5
Questions presented	6
Statement	6
The question is substantial	12

Table of Authorities Cited

Cases

	Pages
Berman v. Parker, 348 U.S. 26	14, 21, 22
Dobbins v. Los Angeles, 195 U.S. 223	5
People v. City of Chicago, 111 N.E. 2d 626	21
People v. Van De Carr, 199 U.S. 552	5
Redevelopment Agency v. Hayes, 122 C.A. 2d 777, denied certiorari to U. S. Supreme Court, 348 U.S. 987	7, 21
Yick Wo v. Hopkins, 118 U.S. 356	5, 18

Codes

Health and Safety Code:	
Section 33000, et seq.	7
Sections 33000-33954	2, 5

Pages

Section 33275 .....18, 19, 20
Sections 33700, 33711, 33730, 33731, 33732, 33733 17
Sections 33701, 33702, 33275, 33745 .....2, 3, 6
Section 33701 .....7, 9, 16, 17, 19, 20

28 U.S.C., Section 1257(2) 3

Constitutions

U. S. Constitution, 14th Amendment 3, 5, 6, 9, 22

Rules

U.S.S.C. Rules, Rule 13 3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No.

ROY FELLOM, JR., LEONIE H. FELLOM, NEAL A. FELLOM,
Plaintiffs and Appellants,
vs.
REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH L. ALIOTO, Chairman, CITY AND COUNTY OF SAN FRANCISCO, DOE ONE, DOE TWO,
Defendants and Appellees.

Appeal from the District Court of Appeal, First Appellate District, Division One, State of California.

STATEMENT AS TO JURISDICTION.

OPINION BELOW.

The opinion of the District Court of Appeal of the State of California is printed in the Appendix and is reported in 157 A.C.A. 257.

JURISDICTION.

This is an appeal from the final judgment of the District Court of Appeal, First Appellate District, Division One, of the State of California, the highest court of the State in which decision could be had. Said judgment affirmed the judgment of the Superior Court of the State of California, which sustained a demurrer without leave to amend to appellants' complaint for injunctive relief against respondent Redevelopment Agency of the City and County of San Francisco. The complaint for injunction was brought to enjoin the Redevelopment Agency from proceeding in eminent domain against appellants' property or in the alternative to require said Agency to grant appellants the right to participate in the redevelopment of their property. The state statute pursuant to which this action was brought is the California Community Redevelopment Law (33000-33954 Health and Safety Code) and those provisions of this law that relate to owner-participation in the redevelopment (Sections 33701, 33702, 33275, 33745, Health and Safety Code).

The judgment herein sought to be reviewed was filed on January 29, 1958. Rehearing was denied on February 28, 1958. Petition for Hearing before the Supreme Court of the State of California was denied and final judgment entered on March 26, 1958. Remittitur issued April 1, 1958. Notice of Appeal to the Supreme Court of the United States was filed June 23, 1958 in the District Court of Appeal, First Appellate District, Division One, State of California. An enlargement to September 1, 1958, to docket this appeal was ordered

by the District Court of Appeal pursuant to Rule 13, U.S.S.C. Rules.

STATUTORY PROVISIONS CONFERRING JURISDICTION OF THE APPEAL ON THIS COURT.

Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257 (2) which provides as follows:

> "Final judgments or decrees rendered by the highest court in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By Appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The validity of the owner-participation provisions of the California Community Redevelopment Law as administered in Diamond Heights (Sections 33701, 33702, 33275, 33745 Health and Safety Code) was first questioned as being repugnant to the Constitution of the United States in appellants' complaint. Said complaint alleged a violation of the Due Process and Equal Protection Clause of the 14th Amendment of the Constitution by the Redevelopment Agency in discriminating between owners without reasonable basis and in the application of inconsistent and arbitrary standards in its conferring of participation favors to some owners while denying these same favors to appellants and the owners of other property equally situated in the Project Area. These were set forth as follows:

Paragraph VII of Complaint

"That the refusal on the part of the Agency to allow plaintiffs to participate in the redevelopment of their properties is in violation of the Due Process Clause and Equal Protection Clause of the 14th Amendment of the Constitution of the United States . . ."

Paragraph XV of Complaint

"That the California Community Redevelopment Law and/or its administration as applied to Diamond Heights violates the Equal Protection Clause of the 14th Amendment in applying an inconsistent or arbitrary standard in denying eligibility for owner-participation to plaintiffs' properties while granting eligibility for owner-participation to other properties equally situated."

The District Court's judgment in sustaining the demurrer and thereby upholding the naked and absolute discretion claimed by the Agency in conferring participation favors on some owners and not on other owners equally situated has sanctioned such arbitrary and discriminatory conduct with the power and force of state law in violation of appellants' constitutional rights.

The validity of the California Redevelopment Law as applied to Diamond Heights, an admittedly non-slum vacant land area, was questioned as being repugnant to the Constitution in the complaint as follows:

Paragraph II, 2nd Cause of Action of Complaint

"That the California Community Redevelopment Law as applied to Diamond Heights is in viola-

tion of the Due Process Clause of the 14th Amendment. That said area does not constitute a blighted area within the meaning of the law . . ."

CASES BELIEVED TO SUSTAIN THE JURISDICTION.

The following cases are believed to sustain the jurisdiction of this Court:

Yick Wo v. Hopkins, 118 U.S. 356;

People v. Van De Carr, 199 U.S. 552 (Distinguished);

Dobbins v. Los Angeles, 195 U.S. 223.

The above are class legislation cases in which an absolute, unregulated discretionary power is vested in an administrative body sanctioned by state law and where its actual exercise by such administrative body has resulted in flagrant discrimination and deprivation of constitutional guarantees under the Due Process and Equal Protection Clause of the 14th Amendment of the U.S. Constitution.

THE STATE STATUTE, THE VALIDITY OF WHICH IS INVOLVED.

The California Community Redevelopment Law is the state statute involved. Its contents are too lengthy for inclusion herein. Its citation is 33000-33954 Health and Safety Code, Deering General Codes Volume 2 pages 681 to 730 inclusive.

The pertinent provisions of the Redevelopment Law as regards Owner-Participation are included in the Appendix to this Jurisdictional Statement. (See page xiv.) These are as follows: Sections 33701, 33702, 33275, 33745 Health and Safety Code.

QUESTIONS PRESENTED.

1. Has Due Process and Equal Protection of the Law under the 14th Amendment to the Constitution of the United States been denied the appellants by the construction of a state statute by the highest Court of the state in which decision could be had, and by the administration of such statute by a Redevelopment Agency, which denied to appellants the right or opportunity to participate in the redevelopment of their property while conferring this same participation right or opportunity on the owners of other properties equally situated in the Project Area?

2. Has Due Process of the Law under the 14th Amendment to the Constitution of the United States been denied the appellants by the application of the California Community Redevelopment Law to a large predominantly vacant and undeveloped raw land area which is admittedly not a slum nor connected with a slum in any way?

STATEMENT.

Appellants own three parcels of unimproved property in the Diamond Heights Redevelopment Project

Area in San Francisco. These parcels have never previously been developed. The Diamond Heights area encompasses approximately 320 acres of predominantly vacant and undeveloped land. The area is an admittedly non-slum vacant land area as set forth in the case of *Redevelopment Agency v. Hayes* (122 C.A. 2d 777) (denied certiorari to U.S. Supreme Court 348 U.S. 987), an earlier case involving Diamond Heights, but which did not involve the issue of owner-participation in the redevelopment.

Diamond Heights was designated a blighted area by respondent Redevelopment Agency and approved for redevelopment under the California Community Redevelopment Law (33000 et seq. Health and Safety Code) by the San Francisco Board of Supervisors on October 26, 1955.

Included in the Final Plan adopted by the Board of Supervisors was a list of a limited number of improved and unimproved properties eligible for owner participation in the redevelopment. This was a token compliance with section 33701 Health and Safety Code which provided for participation in the redevelopment by the owners. Such listing effectively denied participation eligibility to the owners of the great bulk of private property in Diamond Heights and amounted to a freeze-out of 93 percent of all private property—both improved and unimproved—and 97 percent of the unimproved property. Such was set out in the complaint and admitted by the demurrer.

Those properties in the Final Plan which were listed as eligible for owner-participation were set forth as

follows: "Unimproved Parcels Eligible for Owner-Participation" and "Improved Parcels Eligible For Owner-Participation". Some of these parcels were listed as eligible on an individual basis and some on a joint basis with other lot owners. In this same Final Plan were set out the minimum requirements for owner-participation of the improved and unimproved property given participation as being "suitable for use physically, in respect to area, location, dimension, use, and other factors in conformity with the requirements of the redevelopment plan".

Appellants' properties were not listed among those eligible for owner participation. Subsequently, appellants made application to the Agency to be granted participation eligibility on the basis that their property met all published minimum requirements of area, dimension, frontage, location and use, and that in fact the Final Plan itself called for 12 to 15 homes to be built entirely within appellants' property lines. The Agency refused to grant participation eligibility to appellants' properties.

On October 2, 1956, appellants filed Action No. 462320 in the Superior Court of the City and County of San Francisco to enjoin the Redevelopment Agency from proceeding in eminent domain against their property or in the alternative to require the Agency to grant participation eligibility to appellants' properties.

The basis of the action was first that the refusal on the part of the Agency to grant appellants the right or opportunity to participate in the redevelopment of their properties which met all published minimum

requirements was in violation of Section 33701 Health and Safety Code which specifically provided that participation shall be given to the owners if they agree to redevelop in conformity with the Redevelopment Plan as follows:

33701 *Health and Safety Code.* Property Owners' Participation in the Redevelopment

> "Every redevelopment Plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area."

Another basis of the complaint was that the refusal by the Agency to grant participation to appellants' properties while granting participation to other properties equally situated in the project area was discriminatory and in violation of the Due Process and Equal Protection Clause of the 14th Amendment of the Constitution of the United States. Many detailed instances were set forth showing this unequal treatment and arbitrary and discriminatory action by the Agency in granting participation to other unimproved and improved properties which did not meet the published minimum requirements while denying participation to appellant's unimproved properties which met all the requirements.

Another count in the complaint alleged that the Redevelopment Law was never intended to be applied in a large predominantly vacant land area unconnec-

ted with slums as in Diamond Heights and that such application of the law was unconstitutional.

The complaint alleged "that the Agency's verbally stated reason for denying participation to plaintiffs' lots is that changes in lot lines and grades are necessary. That these reasons for disqualification are not equally applied to deny participation to 88 other property owners of improved and unimproved property who are allowed to participate even though similar lot line changes and grading are necessary on their properties." (Paragraph XVI of Complaint.) Many of these other properties were specifically cited in accompanying affidavits showing necessary changes in lot lines and grades as called for in the grading and property maps.

The complaint alleged specifically and in detail the manner in which appellants' properties met all published minimum requirements of area, dimension, frontage, location and use as set out in the final plan and that the plan itself called for several new building lots to be entirely encompassed within appellants' property lines.

None of this is disputed by the Agency. The Agency demurred to the complaint and thereby admitted the truth of these allegations for purpose of the appeal.

No stronger case could possibly be shown of arbitrary action, complete disregard of their own published rules, unequal treatment and discrimination by an administrative agency. In their argument and briefs the Agency has given no direct reason for refusing participation eligibility to appellants' properties.

Previously they had inferred that the reason was changes in lot line and grades but did not pursue this. This is obviously delusive as all the properties which were allowed to participate required changes in lot lines and grades. Such is inherent in redevelopment. Another misleading inference was that they had made a distinction between improved and unimproved property. The Agency did not directly state that they had made such a distinction but they argued very strongly that such a classification would be reasonable and waxed indignant and eloquent about the sanctity of the home which is not involved. But such was not the reason since they had given participation to unimproved property as well as improved although only to a few owners in each class as admitted by the demurrer. Finally, the Agency has come out in its true position and claims complete and absolute discretion in conferring participation favors as they see fit. They claim they can give participation to all owners, to none of the owners, *or to part of the owners.* (Page 5, second paragraph of Respondents' Answer to Petition for Hearing before Supreme Court.) This is what the District Court's opinion has approved. This then is the real issue for this Court's review—whether such an absolute and unlimited discretion can be given to an administrative agency in conferring participation favors to some and not to others of the same class in a redevelopment project area.

THE QUESTION IS SUBSTANTIAL.

The District Court's opinion has raised the issue as to whether an unlimited and absolute discretion without primary standards or reasonable classification in the law can be exercised by a Redevelopment Agency in its conferring valuable participation favors to some owners and denying these same favors to other owners of equally situated property in the same class in a redevelopment project area.

Appellants contend that the code sections on participation in order to maintain their constitutionality did not confer a discretionary power in the Agency but rather provided for a limitation on the Agency's eminent domain powers by making participation a right in the owners. The right or opportunity to participate in the redevelopment must first be given to the owners as a condition precedent to the exercise of eminent domain by the Agency. Only in the event the owners did not agree to participate in the redevelopment in conformity with the redevelopment plan could eminent domain be used. This offer of opportunity to participate follows the pattern of ordinary condemnation for substandard houses in violation of building, fire, and safety codes, where the owners are first warned and given the opportunity of bringing their property up to standard before condemnation proceedings are commenced.

The District Court's opinion in holding that the giving of participation opportunity to all the owners is not mandatory and in vesting complete discretion in the Agency to grant or deny participation favors to

part of the owners in a project area is clearly an unconstitutional enunciation of the law. This was so alleged in appellants' petition for rehearing and for hearing before the Supreme Court. Both petitions were denied. This part of the opinion is as follows: (See Appendix, bottom page x and top page xi.)

> "For instance, the express power of eminent domain would negate the necessity of participation by the owners, if the Agency in its exercise of its constitutional powers acts fairly and without discrimination. Even the language of section 33701, 'Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property . . .' contemplates that participation be not extended to all owners of property. This of course imposes upon the Agency a duty of reasonableness and good faith, if they wish to make participation available to part of the owners of the property embraced in the redevelopment project."

The Agency in summarizing the holding of the District Court's opinion in this regard in their answer to appellants' petition for hearing before the Supreme Court (page 5, second paragraph) similarly claim complete discretion and state:

> "The District Court further held (157 A.C.A. at pp. 263-265) (1) that the Agency and Board of Supervisors, in formulating and adopting a redevelopment plan, are empowered by the California Community Redevelopment Law (Health and Safety Code par. 33000-33954) to provide for

participation by none of the owners (par. 33702, 33745, 33267, 33708), by all of the owners (par. 33701), *or by only part of the owners* (par. 33701, 33708), . . ." (Emphasis added.)

The conferring of participation favors is the granting of a valuable property right and the opportunity to enjoy this right therefore must be given to all the owners in the project area equally or to all owners in a reasonable classification in order to maintain its constitutionality. The conferring of such a valuable right and opportunity is not a matter for the administrative discretion of an agency even if such discretion is exercised reasonably and in good faith as the opinion holds. The Agency contends that the conferring of participation on only part of the owners is no different than the exercise of the Agency's discretion in condemning only part of an area or in either taking or not taking a piece of property under eminent domain when no participation is involved. (See footnote page 7, Respondents' Answer to Petition for Hearing before Supreme Court.) Appellants contend there is no parity here. In the latter instance, only a power is exercised with no rights conferred. In the former, a valuable property right of participation is conferred.

The conferring of valuable participation rights and favors on some owners and not on others is completely different from the exercise or non exercise of eminent domain on particular pieces of property in the project area and where no participation is involved. Such was the case of *Berman v. Parker,* 348 U.S. 26, which

was quoted in the District Court's opinion (see Appendix, page vi, pars. 2 and 4), and relied on so heavily by the Agency. This case held:

> "It is not the function of the courts to sort and choose among the various parcels selected for condemnation . . . Community Redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building."

Thus, although it may be the Agency's function and not the Court's function to "parse among the parcels" in exercising or not exercising the power of eminent domain when no participation is involved, yet neither the Agency nor the Courts can "parse among the parcels" in conferring a right or opportunity of participation on some owners and not on others. Favors and rights or the opportunity to enjoy such rights must be conferred equally on all in the same class.

It is not for the Agency to determine the classification to be made or which of the owners shall receive participation opportunity. The Agency has admitted by its demurrer to the complaint to discrimination within the class of unimproved property. The sustaining of the demurrer by the District Court and the Court's failure to rule on such discrimination validates the action of the Agency in conferring participation favors within the subclassification of unimproved properties. Clearly, the Agency cannot confer favors on some and not on others in the same subclassification of owners.

The District Court's opinion is unclear as to whether the Agency had made a reasonable distinction as between improved and unimproved property. But if such is the basis for the District Court's holding it was not responsive to the facts alleged in the complaint because the Agency has admitted by its demurrer to making no such distinction, having arbitrarily conferred its participation favors on some of the owners of both classes of property.

The District Court's opinion (see Appendix page xi, par. 1), in holding that section 33701 by its reference to "all or part" confers discretion on the Agency to give participation favors to only part of the owners would make this code section unconstitutional. This code section reads as follows:

> 33701 *Health and Safety Code*
>
> "Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of *all* or *part* of such property if the owners agree to participate in the redevelopment in conformity with the Redevelopment Plan. . . ." (Emphasis added.)

It is appellants' contention that "all or part" does not give discretion to the Agency to determine which of the owners shall receive participation favors. Rather, the use of the words "all or part" confers the most widespread and universal right of participation in the owners possible. Such is common legislative phraseology denoting the giving of the widest right or invitation. It is all inclusive and means that all owners shall be given the right although only part of

the owners may exercise their right to participate. However, all owners must be given the right or opportunity to participate if they choose to agree to participate as set out as follows: ". . . if the owners agree to participate in the redevelopment in conformity with the Redevelopment Plan." The volition is with the owners to agree or not to agree to participate, not with the Agency to determine which part shall be allowed to participate. Participation *opportunity* therefore must be given equally to *all* owners although only part of the owners may exercise their right to participate. This keeps it constitutional.

Nowhere in the law has express discretion been given the Agency to confer participation favors. The tenuous basis for such discretion is the reference to "all or part" in Section 33701 as set out in the opinion. Appellants objected to such a discretionary power in the Agency on the basis that it would leave the law without any primary standards to govern such discretion. (See Petition for Rehearing and Petition for Hearing before Supreme Court.) The Agency, in order to uphold participation as a discretionary power, attempts to provide the primary standards for participation by citing the code sections conferring general powers in the Board of Supervisors as the legislative body to prepare redevelopment plans for the community and cites the following code sections (Sections 33700, 33711, 33730, 33731, 33732, 33733, Health and Safety Code). (Pages 8 and 9 of Respondent's Answer to Petition for Hearing before Supreme Court.) Yet none of these Code sections mentions the

word participation and hence cannot be primary standards. Nor can the legislature delegate its own power to set the primary standards for participation to the Board of Supervisors, no more than it can delegate it to the Agency.

The District Court's opinion indicated that the Agency could make a reasonable classification between improved and unimproved property in the granting of participation favors. It cited Section 33275, Health and Safety Code, as the basis for this distinction. (See Appendix, page xi, par. 2.)

Appellants contend that such a distinction would be class legislation which discriminates against the unfortunate owners of unimproved property in favor of the fortunate owners of improved property. The case of *Yick Wo v. Hopkins* (118 U.S. 356), in which a classification between brick and frame buildings for laundries was considered unconstitutional, is directly in point.

There is no reasonable basis for a distinction between improved and unimproved property in conferring participation favors. Respondents' vigorous argument of the sanctity of the home—"a man's home is his castle"—has no application here. Section 33275, Health and Safety Code, does not even mention "homes" but instead refers to "real property upon which an existing *building* is to be continued on its present site and in its present form and use". These could be factory buildings, garages, horse sheds, or vacant warehouses.

Contrary to the District Court's opinion, the purpose of Section 33275 was not to confer participation on the owners of improved property which was already conferred on all owners of "property" (both improved and unimproved) by Section 33701, but it was to do away with the necessity of participation by improved property owners and to exempt them from redevelopment entirely when no changes were to be made on such property. Additionally, and incidental to its main purpose, this Code section provided that if changes were necessary either to the *structure* or to the *site* or *lot* on which the building is situated the Agency could acquire such property only *if "the owner fails or refuses to agree to participate in the redevelopment plan pursuant to sections 33701 and 33745"*. This strengthens appellants' contention that 33701 gives participation to both improved and unimproved property as long as the owners agree to conform. It shows the legislative intent to provide for the utmost owner-participation.

As between property with buildings and property without buildings what is the reasonable basis for allowing participation to one group and not to the other? Section 33275, Health and Safety Code, allows participation to owners of buildings even though complete rehabilitation of the building or a change in the use or site or lot on which the building is situated is involved. How does such total destruction and rebuilding from such newly created cleared and vacant lot differ from unimproved property which is already cleared and vacant? Why should one owner be pre-

ferred over the other? Clearly there is no reasonable basis for such a distinction and Section 33275 was never intended to make such an artificial and controversial distinction between classes of property for participation. Section 33701 is the code section conferring participation rights and it confers such participation on all "property" without classification as to kinds.

The District Court's opinion has confused the power of the Agency to provide for participation or not in redevelopment *plans* with the question of granting or denying participation among the owners in a plan *which already provides for participation.* Whether or not the Agency has the discretion to decide which plans or projects shall provide for owner participation has no bearing on Diamond Heights which already provides for participation by the owners. The sole question in Diamond Heights is whether the Agency has discretion to deny participation favors to some owners and grant these same favors to other owners equally situated. Involved are constitutional considerations of special favors to some and not to others—discrimination and unequal treatment to owners in the same class.

Participation is a unique provision of the California Community Redevelopment Law. No other state has provisions for owner participation. It is beneficial and equitable in allowing owners the right to redevelop their property first before eminent domain is used. As between two private persons—the buyer from the Agency and the present owner—why should the

latter be preferred, if the former agrees to redevelop in conformity with the redevelopment plan? The same ends of redevelopment are achieved in the time and manner set forth in the plan. Participation of the owners would remove the resistance to redevelopment projects and to their extension to vacant land areas admittedly not slums. How can the owner object if he is first given the right or opportunity to redevelop his property before it is taken away from him? The importance of this question is great as it affects thousands of property owners in the rapidly multiplying redevelopment projects up and down the state. This Court's clarification of "owner-participation" is vital to the successful operation of this law in California.

The only other question is whether the Redevelopment Law which was intended as a slum clearance or prevention measure can be used for seizing large raw undeveloped vacant land areas for private home development. The factual situation presented in *Berman v. Parker,* 348 U.S. 26, still concerned a slum area or rather a deteriorated area, part of which was a slum area. It was a built-up area as contrasted with Diamond Heights which is an admittedly vacant land area unconnected with slums in any way. No case other than *People v. City of Chicago,* 111 N.E. 2d 626, has extended redevelopment to vacant land areas. The unsound reasoning of that case in holding that such was a slum prevention measure since it provided for additional housing was unfavorably commented on in the case of *Redevelopment Agency v.*

Hayes, 122 C.A. 2d 777, on the basis that any project could be supported as slum prevention if only it provided for additional housing. The *Hayes* case justified the seizure of Diamond Heights on the basis of its economic disuse and the "economic need" of the community. Such could serve as the basis for the seizure of any vacant undeveloped land, long dormant, hilly, in diverse ownership, and which had not been built upon for some reason. Even with the broad definition of police powers as set out in *Berman v. Parker* it is questionable whether vacant land per se, whatever the "economic need", qualifies for seizure for home development. Vacant land is not a menace to health, morals, safety or the welfare of the community. Esthetically and spiritually it is as satisfying or more so than is present day row housing developments. Constitutionally it seems to be an arbitrary and capricious use of the police powers in discriminating against vacant and undeveloped land in violation of the 14th Amendment. Certainly, it has no relation to slum clearance or prevention which conditions this law was intended to correct.

Dated, San Francisco, California,
August 15, 1958.

NEAL A. FELLOM,
In Propria Persona.

(Appendices A and B Follow.)

Appendix A

(Vol. 157 A.C.A. 257.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 17,715

ROY FELLOM, JR., LEONIE H. FELLOM, NEAL A. FELLOM,
Plaintiffs and Appellants,
vs.
REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH L. ALIOTO, Chairman, CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants and Respondents.

OPINION

This is an appeal by plaintiffs from a judgment after order sustaining defendants' demurrer to plaintiffs' complaint without leave to amend.

Appellants are the owners of three separate vacant and unimproved parcels of land in the Diamond Heights District in San Francisco. Respondent Re-

development Agency has designated Diamond Heights a blighted area and approved it for redevelopment under the Community Redevelopment Law (Health & Saf. Code, § 33000 et seq.), with approval for redevelopment by the Board of Supervisors of the City and County of San Francisco having been determined before the commencement of this action. Appellants filed an action in the San Francisco Superior Court seeking to enjoin the redevelopment agency from proceeding in eminent domain against their property. The complaint alleges that they made application to the agency to allow them to participate in the redevelopment of their property in conformance with the master plan, and in accordance with the provisions of the California Community Redevelopment Law, but that the agency refuses to allow the plaintiffs their right to participate; that this refusal on the part of the agency to allow the plaintiffs to participate is a violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Constitution of the State of California. The complaint also alleges that the agency denies participation to the majority of the owners of land in Diamond Heights, about 90 per cent of the total privately owned acreage in the area having been refused participation rights; that participation has been denied to about 97 per cent of the total privately owned, unimproved property, by acreage while eligibility to participate has been granted to the owners of approximately 75 per cent of the improved property, by acreage, within the area. The complaint further alleges that the agency has

stated that the reason for denying participation to plaintiffs' lots is that changes in lot lines and grades are necessary, but that these reasons have not been equally applied to all other properties equally situated and where similar lot line changes and grading are necessary; "[t]hat there is no reasonable basis for this discrimination as plaintiffs' unimproved lots meet all of the minimum qualifications for participation as stated in the Master Plan for Diamond Heights as to area, location, dimensions, use and frontage." The complaint further alleges that the agency has a vested interest in seeing that owner participation is denied in that redevelopment and administrative costs will be self-liquidating from the proceeds of resale on property acquired by eminent domain, and that for this reason it is impossible for the agency to exercise an impartial discretion in granting owner participation. In the second cause of action appellants' complaint alleges that Diamond Heights is not a blighted area within the meaning of the California Community Redevelopment Law. The plaintiffs pray for an order directing the agency to grant eligibility for participation to their property in the redevelopment of their property in conformance with the master plan, and/or for an injunction permanently restraining and enjoining the defendants from condemning or otherwise proceeding against the said property of the plaintiffs by eminent domain; (2) for an order directing the defendants to appear and show cause why a temporary restraining order or preliminary injunction should not issue restraining the agency from condemning or otherwise proceeding against plaintiffs'

property during pendency of this action; and (3) for such general and special damages as hereafter ascertained and proved. A general demurrer to this complaint was sustained without leave to amend and the appellants appeal from the judgment entered thereon.

The Community Redevelopment Law as affecting Diamond Heights has been passed on by this court (*Redevelopment Agency v. Hayes,* 122 Cal.App.2d 777 [266 P.2d 105]). This law has for its purpose the elimination of slums and unpleasant living conditions in cities, and the redevelopment of badly planned areas or unused land. Together with other legislation the Redevelopment Laws have for their purpose the object of achieving sound, well-planned cities. In the enactment of the California Redevelopment Law the Legislature of this state has declared that blight exists here (Health & Saf. Code, § 33040), and somewhat repetitiously describes the evils of such blight (Health & Saf. Code, §§ 33040, 33045, 33046, 33048). The Legislature also found this blight to be a social and economic liability menacing the health, safety, and general welfare of the people of this state. (Health & Saf. Code, §§ 33040, 33045, subd. (a).) In section 33046, subdivision (a), the Legislature finds that existing blight promotes a lack of incentive in the individual landowner and thereby causes further obsolescence, deterioration, and disuse, and also finds that blight is usually found in areas divided into small and widely scattered ownerships where private solution is difficult, costly, and uneconomic—if not impossible. (Health & Saf. Code, § 33046, subd. (c).)

In the law, the Legislature gives the power of eminent domain to the authority whenever redevelopment cannot be accomplished by private enterprise alone. (Health & Saf. Code, § 33267, subd. (b).)

The appellants here urge that the Redevelopment Law is unconstitutional as applied to nonslum-type "blighted" areas or to undeveloped vacant land areas so designated. In support of this position the appellants cite *Schneider v. District of Columbia,* 117 F. Supp. 705, and also *Redevelopment Agency v. Hayes, supra.* The citation of *Schneider v. District of Columbia* can be of small solace to appellants here, since the opinion in *Berman v. Parker,* 348 U.S. 26 [75 S.Ct. 98, 99 L.Ed. 27], supersedes the Schneider opinion and affirms the validity of the Federal Redevelopment Law applicable to the District of Columbia. Appellants also cite *Redevelopment Agency v. Hayes,* 122 Cal.App.2d 777 [266 P.2d 105]. However, that case in fact held that the Redevelopment Law is not unconstitutional as applied to nonslum-type "blighted" areas or to undeveloped, vacant land areas so designated, specifically the Diamond Heights area. In *Berman v. Parker, supra,* it is said, "In the present case, the Congress and its authorized agencies [the District of Columbia Redevelopment Land Agency, the National Capital Planning Commission, and the District Commissioners] have made determinations which take into account a wide variety of values. It is not for use to reappraise them." (P. 33.)

"Once the question of the public purpose has been decided, the amount and character of land to be taken

for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." (Pp. 35, 36.)

"If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not . . . the function of the courts to sort and choose among the various parcels selected for condemnation.

"The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (P. 36.)

"If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." (P. 35.)

We feel that the appellants' contention that the Redevelopment Law is unconstitutional as applied to nonslum-type "blighted" areas is not supportable, and hold that in the absence of an unconstitutional exercise of the powers granted under the Community Redevelopment Law the legislation is valid and constitutional.

The appellants also urge that the Redevelopment Law is unconstitutional as being legislation by the state on matters of municipal concern, in violation of article XI, sections 6, 8 and 13 of the state Constitution; and also that there has been an unlawful delegation of legislative power to the agency by the board of supervisors. Neither of these contentions is well taken. It must be remembered that redevelopment, when enacted by the state, is a matter of state interest, and its implementation is in order to effect a state objective. The California Housing Authorities Law is particularly apposite here, since that law gives to housing authorities certain powers as public bodies corporate and politic and not as agents of the city in which they function. "[T]he local operation of an act of general state-wide scope may be made contingent upon determination by local authorities that conditions there require its acceptance and operation." (*Housing Authority v. Dockweiler,* 14 Cal.2d 437, 446 [94 P.2d 794].) The language used in *Housing Authority v. City of Los Angeles,* 38 Cal.2d 853, 861-862 [243 P.2d 515], is persuasive here: "Similarly the city under the Housing Authorities Law is an agency of the state, functioning under state law to fulfill state purposes, and is not acting pursuant to its fundamental law to effect solely municipal objectives. [Citations.] Each functioning body, the city and the housing authority, is a separate body politic vested with specific duties and powers under the Housing Authorities Law and Housing Cooperation Law to effect a state objective. Neither is functioning independently of that state law.

In pursuing the state objective each is governed by the state law and neither may exercise powers not vested or recognized by that law. The city and the housing authority function as administrative arms of the state in pursuing the state concern and effecting the legislative objective." Section 33040, Health and Safety Code, provides expressly as follows: "It is found and declared that there exist in many communities blighted areas which constitute either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and general welfare of the people of such communities and of the State."

While legislative declarations, such as those contained in section 33040, Health & Safety Code, and 33045 of the same code, are not binding upon this court, they are, as declarations of policy, "entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation." (*Housing Authority v. Dockweiler,* 14 Cal.2d 437, 449-450 [94 P.2d 794].)

The appellants and amicus curiae on their behalf present a more difficult problem in relation to the application of the code sections in the Community Redevelopment Law which contain provisions for participation in the redevelopment plan by owners of property embraced in the area to be redeveloped. As is indicated in "Redevelopment: Making Misused and Disused Land Available and Usable," 8 Hastings Law Journal 241 (May 1957), in a footnote on page 260, the legislative enunciation of the owner's rights to

participate in a redevelopment plan leaves something to be desired in clarity and certainty. These sections of the Health and Safety Code, 33701, 33702, and also 33275, 33745, and 33746, would seem to indicate that the owners of all or part of the property to be redeveloped must be included in a plan for participation in the redevelopment of the property. Indeed, section 33701, which reads as follows: "Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area. This section does not prohibit the owners from submitting an alternative plan pursuant to this part," and the language of section 33702, which provides, "Every redevelopment plan which contemplates property owner participation in the redevelopment shall contain alternative provisions for redevelopment of the property if the owners fail to participate in the redevelopment as agreed," would appear to be mandatory in their expression.

However, section 33702, which provides, "Every redevelopment plan which contemplates property owner participation in the redevelopment shall contain alternative provisions for redevelopment of the property if the owners fail to participate in the redevelopment as agreed," appears to be a recognition of the power to have redevelopment without property owner participation. Coupled with this latter language, it should be remembered that section 33267 provides,

"Within the redevelopment area or for purposes of redevelopment an agency may: . . . (b) Acquire real property by eminent domain . . .," thereby giving the agency the absolute power of eminent domain for proper public purposes.

Assuredly, the power of eminent domain does not contemplate any participation by the owner of the property condemned. The language contained in section 33745, "If the redevelopment plan adopted provides for participation in the redevelopment of property in the area by the owners of such property, and if for 30 days after the adoption of the plan, the owners fail or refuse to enter into a binding agreement for participation in accordance with the plan, the alternative provisions provided for in Section 33702 become effective as the official redevelopment plan of the project area. The legislative body may extend the 30-day period by not more than 60 days," is certainly language which contemplates redevelopment plans which do not provide for participation by the owners, since, if such were not the case, the first sentence of the section would not be worded as it is.

We have no doubt that the Legislature, in enacting the Community Redevelopment Law, hoped that redevelopment would be possible in areas such as the Diamond Heights Area with the participation and cooperation of the owners of the property within the "blighted" area, but it is also apparent from a reading of all the sections and the entire law that there is provision for a method of redevelopment without participation by the owners of the land. For instance, the

express power of eminent domain would negate the necessity of participation by the owners, if the agency in its exercise of its constitutional powers acts fairly and without discrimination. Even the language of section 33701, "Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property . . .," contemplates that participation be not extended to all owners of the property. This, of course, imposes upon the agency a duty of reasonableness and good faith, if they wish to make participation available to part of the owners of the property embraced in the redevelopment project.

Appellants here complain that the distinction drawn by the redevelopment agency between owners of improved property and owners of unimproved property is unreasonable and discriminatory. Contrariwise, such distinction appears to be reasonable and supportable. Even the Community Redevelopment Law itself, Health and Safety Code, section 33275, recognizes the distinction between these classes of property; that section reads: "Without the consent of an owner an agency shall not acquire any real property on which an existing building is to be continued on its present site and in its present form and use unless such building requires structural alteration, improvement, modernization or rehabilitation, or the site or lot on which the building is situated requires modification in size, shape or use or it is necessary to impose upon such property any of the standards, restrictions and controls of the plan and the owner fails or refuses to

agree to participate in the redevelopment plan pursuant to Sections 33701 and 33745." The distinction between improved and unimproved property is such a distinction as to appeal to the reason. The mere statement of such a distinction raises a presumption of fairness and, as is pointed out in *Fraenkel v. Bank of America,* 40 Cal.2d 845, 849 [256 P.2d 569]; "All presumptions favor the legislative classification, which cannot be overturned unless plainly arbitrary. [Citations.] If the Legislature could have acted upon any conceivably reasonable ground, the courts must assume that the Legislature acted upon such basis. In short, the Legislature's judgment 'on the question whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with except for very grave causes and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists.' [Citation.]"

Appellants and amicus curiae have well and ably advanced their arguments. They have included a summary of that portion of the law regarding participation and contrasted it with other states' redevelopment laws. Their arguments are persuasive but, we feel, not governing.

Furthermore, it appears here that by attempting to enjoin a threatened legal action the appellants have, in fact, mistaken their remedy. All of the grounds which they urge upon this court for a reversal of the judgment of the court below are grounds which may

be raised as affirmative defenses in the eminent domain proceedings which are pending in the court below. Under such facts, the judgment appealed from is affirmed.

McMurray, J., pro tem.*

Peters, P. J., and Bray, J., concurred.

Filed January 29, 1958,
Lawrence R. Elkington, Clerk.

*Assigned by Chairman of Judicial Council.

Appendix B

THE STATE STATUTES, THE VALIDITY OF WHICH IS INVOLVED.

33701—Every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area.

33702—Every Redevelopment Plan which contemplates property owner participation in the Redevelopment shall contain alternative provisions for redevelopment of the property if the owners fail to participate in the redevelopment as agreed.

33745—If the redevelopment plan adopted provides for participation in the redevelopment of property in the area by the owners of such property, and if for 30 days after the adoption of the plan the owners fail or refuse to enter into a binding agreement for participation in accordance with the plan, the alternative provisions provided for in Section 33702 become effective as the official redevelopment plan of the project area.

33275—Without the consent of an owner an agency shall not acquire any real property on which an existing building is to be continued on its present site and in its present form and use unless such building requires structural alteration, improvement, modernization or rehabilitation, or the site or lot on which

the building is situated requires modification in size, shape or use or it is necessary to impose upon such property any of the standards, restrictions and controls of the plan and the owner fails or refuses to agree to participate in the redevelopment plan pursuant to Sections 33701 and 33745.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 20 1958
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 323

ROY FELLOM, JR., LEONIE H. FELLOM, NEAL A. FELLOM,
Plaintiffs and Appellants,

vs.

REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH L. ALIOTO, Chairman, CITY AND COUNTY OF SAN FRANCISCO, DOE ONE, DOE TWO,
Defendants and Appellees.

Appeal from the District Court of Appeal, First Appellate District, Division One, State of California.

APPELLEES' MOTION TO DISMISS OR AFFIRM.

DION R. HOLM,
City Attorney of the City and County of San Francisco,
GEORGE E. BAGLIN,
Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Attorneys for Defendants and Appellees.

MORLEY GOLDBERG,
Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Of Counsel.

Subject Index

	Page
Questions presented	2
Statement of the case	2
Argument	5
1. The holding that appellants have an adequate remedy at law presents no federal question	5
2. Construction of a state statute is not a federal question	6
3. Constitutionality of the California Community Redevelopment Law as applied to the Diamond Heights Redevelopment Project has previously been determined and presents no substantial federal question	12
Conclusion	13

Table of Authorities Cited

Cases	Pages
Amer. Distilling Co. v. State Bd. of Equalization, 144 C.A. 2d 457	12
Balsamo v. Providence Redevelopment Agency, R.I., 124 Atl. 2d 238	9
Berman v. Parker, 348 U.S. 26	4, 7, 8, 12, 13
Buck v. Kuykendall, 267 U.S. 307	12
Colorado Central Power Co. v. City of Englewood, 89 F. 2d 233	6
Georgia v. City of Chattanooga, 264 U.S. 472	5
Godchaux Company v. Estopinal, 251 U.S. 179	10
Hurley v. Commission of Fisheries, 257 U.S. 223	12
Kaskel v. Impelliteri, 306 N.Y. 73, 115 N.E. 2d 659, cert. den. in 347 U.S. 934	8
Kredo v. Phelps, 145 Cal. 526	6
Madden v. Kentucky, 309 U.S. 83	7
Mergenthaler Linotype Co. v. Davis, 251 U.S. 256	10

Pages

People v. City of Chicago, 414 Ill. 600, 111 N.E. 2d 626... 13

Porto Rico Tel. Co. v. Puerto Rico Communications Authority, 189 F. 2d 39, affirming 89 F. Supp. 922, cert. den. 342 U.S. 830 5

Redevelopment Agency v. Hayes, 122 C.A. 2d 777, cert. den. 348 U.S. 987 .....2, 4, 9, 12, 13

Robinette v. Chicago Land Clearance Commission, 115 F. Supp. 669, mandamus denied in 342 U.S. 940 6

Sayward v. Denny, 158 U.S. 180 10

St. Louis S.W.R. Co. v. Arkansas, 235 U.S. 350 7

Taliaferro v. Industrial Ind. Co., 131 C.A. 2d 120 6

Watson v. Burk, 313 U.S. 387 7

Codes

California Health and Safety Code (California Community Redevelopment Law):

Sections 33000-33954 2

Section 33013 ..... 3, 11

Section 33275 ..... 3, 11

Section 33700 11

Section 33701 3

Section 33711 11

Section 33730 11

Section 33732 11

Section 33733 11

Rules

Rules of the Supreme Court of the United States:

Rule 16, 1, (b) 1, 10

Rule 16, 1, (c) 1

Texts

35 C.J.S. 1247-48 7

43 C.J.S. 481 6

6 Nichols on Eminent Domain, 3rd ed., Section 28.22(1), page 382 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 323

ROY FELLOM, JR., LEONIE H. FELLOM, NEAL A. FELLOM,
Plaintiffs and Appellants,
vs.
REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH L. ALIOTO, Chairman, CITY AND COUNTY OF SAN FRANCISCO, DOE ONE, DOE TWO,
Defendants and Appellees.

Appeal from the District Court of Appeal, First Appellate District, Division One, State of California.

APPELLEES' MOTION TO DISMISS OR AFFIRM.

Appellees move that this appeal be dismissed or, in the alternative, that the judgment (157 A.C.A. 257, 320 P.2d 884) be affirmed on the ground that the appeal does not present a substantial federal question. (Rule 16, 1, (b) (c), Rules of the Supreme Court of the United States.)

QUESTIONS PRESENTED.

1. Whether the judgment of the District Court of Appeal that appellants' remedy is not to enjoin the Redevelopment Agency from prosecuting its eminent domain action, but to litigate their defenses in that action, presents a federal question.

2. Whether construction of the California Community Redevelopment Law (Calif. Health & Safety Code §§33000-33954) is a federal question.

3. Whether constitutionality of the California Community Redevelopment Law as applied to the Diamond Heights Redevelopment Project presents a substantial federal question in view of the decision in *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, cert. den. in 348 U.S. 987, that it is constitutional as so applied.

STATEMENT OF THE CASE.

Appellants are owners of three unimproved parcels of land in the Diamond Heights Redevelopment Project. Alleging that the Redevelopment Agency contemplated bringing an eminent domain action to acquire their land, appellants filed suit against the Agency in the superior court in San Francisco to enjoin it from commencing such action on the ground they would have a valid defense of discrimination thereto in that the Agency had refused to allow them as well as practically all other owners of unimproved land to participate in the redevelopment plan, while allowing most owners of improved land to do so, thereby

violating section 33701 of the California Health and Safety Code and denying appellants due process and equal protection of the law. Appellants alleged "that participation has been denied to about 97 per cent of the total privately owned, unimproved property, by acreage, while eligibility to participate has been granted to the owners of approximately 75 per cent of the improved property, by acreage, within the area." (157 A.C.A. at p. 259.)

Appellants also alleged that the California Community Redevelopment Law as applied to the Diamond Heights Redevelopment Project violated the Due Process Clause of the 14th Amendment in that the project area is not blighted within the meaning of the law.

The superior court sustained the Agency's demurrer to appellants' complaint and gave judgment for the Agency.

The District Court of Appeal affirmed. (157 A.C.A. 257, 320 P. 2d 884.) It held, as a matter of statutory construction, that the California Legislature in enacting the California Community Redevelopment Law intended to empower the Agency and the Board of Supervisors to provide for participation by none, all, or only part of the owners. (157 A.C.A. at pp. 263-265.) It also held that the distinction drawn by the Agency between improved and unimproved property was recognized in the California Community Redevelopment Law (California Health and Safety Code §33275; also §33013) and "appears to be reasonable and supportable." (157 A.C.A. at pp. 264-265.)

The District Court of Appeal further held that the Agency's power to grant participation to only part of the owners "of course imposes upon the agency a duty of reasonableness and good faith," and that the Agency must act "fairly and without discrimination" (157 A.C.A. at p. 264), but that appellants should raise their defense of discrimination and other defenses in the eminent domain action, not by an injunction suit. Said the court:

> "Furthermore, it appears here that by attempting to enjoin a threatened legal action the appellants have, in fact, mistaken their remedy. All of the grounds which they urge upon this court for a reversal of the judgment of the court below are grounds which may be urged as affirmative defenses in the eminent domain proceedings which are pending in the court below. Under such facts the judgment appealed from is affirmed." (157 A.C.A. at p. 265.)

The District Court of Appeal rejected appellants' contention that the California Community Redevelopment Law is unconstitutional as applied to vacant land in the Diamond Heights Redevelopment Project, pointing out that the case of *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, in which certiorari was denied (348 U.S. 987), "held that the Redevelopment Law is not unconstitutional as applied to nonslum-type 'blighted' areas or to undeveloped vacant land areas so designated, specifically the Diamond Heights area." (157 A.C.A. at p. 261.) The District Court of Appeal also cited *Berman v. Parker,* 348 U.S. 26, which case, sustaining the Federal Redevelopment

Law applicable to the District of Columbia, held that, in the area of redevelopment, Congress and its agencies could take into consideration a wide variety of values, aesthetic as well as monetary, and that the police power is not delimited by the concepts of public safety, health and morality. (348 U.S. at pp. 32, 33.)

ARGUMENT.

1. THE HOLDING THAT APPELLANTS HAVE AN ADEQUATE REMEDY AT LAW PRESENTS NO FEDERAL QUESTION.

The holding of the District Court of Appeal that appellants, in seeking an injunction instead of setting up their defense of unlawful discrimination in the eminent domain action, had mistaken their remedy, does not present a federal question. It is well settled that the prosecution of an action at law will not be enjoined by a court of equity because the plaintiff claims he will have a good defense to the law action.

> *Georgia v. City of Chattanooga,* 264 U.S. 472, 483-484 [suit to enjoin prosecution of eminent domain action dismissed; Court states: ". . . suits in equity will not be sustained in any case where a plain, adequate and complete remedy may be had at law. . . ."];
>
> *Porto Rico Tel. Co. v. Puerto Rico Communications Authority,* 189 F. 2d 39, 41, affirming 89 F. Supp. 922, cert. den. 342 U.S. 830 [suit to enjoin prosecution of eminent domain action; defendant judgment affirmed];

Robinette v. Chicago Land Clearance Commission, 115 F. Supp. 669, 672 (motion for leave to file petition for writ of mandamus denied in 342 U.S. 940);

Colorado Central Power Co. v. City of Englewood, 89 F. 2d 233, 235;

Nichols on Eminent Domain, 3rd ed., vol. 6, §28.22(1), p. 382;

Taliaferro v. Industrial Ind. Co., 131 C.A. 2d 120, 122 ["The prosecution of a cause of action at law will not be enjoined because the plaintiff seeking the injunction has a good defense to it where that defense may be interposed in the threatened action."];

Kredo v. Phelps, 145 Cal. 526, 527;

43 C.J.S. 481 ["Matters of defense of which complainant may avail himself in an action at law ordinarily cannot be made the ground of an injunction to restrain proceedings in such action."]

---

2. CONSTRUCTION OF A STATE STATUTE IS NOT A FEDERAL QUESTION.

The District Court's construction of the California Community Redevelopment Law as empowering the Agency rather than the owners to determine whether all or only part of the owners should be allowed to participate in the development plan, provided it "acts fairly and without discrimination," with "reasonable-

ness and good faith," presents no federal question. The construction of a state statute is a matter of state, not federal law.

> *Watson v. Burk,* 313 U.S. 387, 401 ["The Florida Supreme Court . . . under our dual system of government has the last word on the construction and meaning of statutes of that state, . . ."];
>
> *Madden v. Kentucky,* 309 U.S. 83, 87 ["This interpretation of the state laws is of course accepted by us."];
>
> *St. Louis S.W. R. Co. v. Arkansas,* 235 U.S. 350, 362 ["Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort."];
>
> 35 C.J.S. 1247-48 [". . . where a state statute has been construed by the highest judicial tribunal of a state, such construction is regarded as part of the statute and is as binding on the federal courts as the text of the statute itself."].

Apropos the holding of the District Court of Appeal that the statute gave the Agency power to permit only part of the owners to participate, in *Berman v. Parker,* 348 U.S. 26, 33-34, it was held that "the means of executing the project are for Congress and Congress alone to determine," and this "disposes of any contention concerning the fact that certain property owners in that area may be permitted to repurchase their properties for redevelopment in harmony

with the over-all plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose."

In *Kaskel v. Impelliteri,* 306 N.Y. 73, 115 N.E. 2d 659, 662, cert. den. in 347 U.S. 934, the court said:

> "However, the situation here actually displayed is one of those as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts. If there were to be a trial here and the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts. The question is simply not a justiciable one."

Similarly it was said in *Berman v. Parker,* 348 U.S. 26, 35-36:

> "It is not . . . the function of the courts to sort and choose among the various parcels selected for condemnation." (348 U.S. at p. 36.)
>
> "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment pro-

> grams need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." (348 U.S. at p. 35.)

To like effect are ***Balsamo v. Providence Redevelopment Agency,*** ..... **R.I.** ....., **124 Atl. 2d 238, 240-241, and *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, 790.**

Appellants' argument that the participation provisions of the California Community Redevelopment Law are invalid because the Law sets forth no "primary standards" to govern the Agency and Board of Supervisors in determining the scope of participation was an afterthought first raised by appellants subsequent to rendition of the judgment below. Appellants defended their tardy presentation by stating: "Appellants believe that a new point that raises a possible unconstitutional result in an opinion is always in order." (Appellants' Petition for Hearing by the California Supreme Court, p. 11, lines 1 to 5.)

In their "Statement as to Jurisdiction," p. 11, appellants state that this belated contention "is the real issue for this Court's review."[1]

---

[1]The claim of lack of "primary standards" is practically the sole basis of appellants' appeal to this Court. Thus appellants' Statement as to Jurisdiction says:

> "The District Court's opinion has raised the issue as to whether an unlimited and absolute discretion without primary standards . . . can be exercised by a Redevelopment Agency . . ." (p. 12)
>
> "Appellants objected to such a discretionary power in the Agency on the basis that it would leave the law without any primary standards to govern such discretion. (See Petition

This so-called "real issue" was therefore not timely or properly raised and does not present a federal question.

Mergenthaler Linotype Co. v. Davis, 251 U.S. 256, 258 ["But this point came too late, being first advanced below on the motion for rehearing."];

Godchaux Company v. Estopinal, 251 U.S. 179, 181;

Sayward v. Denny, 158 U.S. 180, 183;

Rule 16, 1, (b), Rules of the Supreme Court of the United States.

But the point is wholly without merit because the Legislature *has* established the primary standards which govern the Agency and Board of Supervisors in applying all of the provisions of the Law, including the participation provisions. These standards are:

---

for Rehearing and Petition for Hearing before Supreme Court.)" (p. 17)

"This, then, is the real issue for this Court's review—whether such an absolute and unlimited discretion can be given to an administrative agency in conferring participation favors to some and not to others of the same class in a redevelopment project area." (p. 11)

"The Agency . . . claims complete and absolute discretion in conferring participation favors as they see fit." (p. 11)

"The District Court's opinion . . . vest[s] complete discretion in the Agency to grant or deny participation favors." (p. 12)

"An absolute, unregulated discretionary power is vested in an administrative body by state law . . ." (p. 5)

See, also, appellants' reference to:

"the naked and absolute discretion claimed by the Agency in conferring participation favors on some owners and not on others equally situated." (p. 4)

1. "The interests of the public peace, health, safety and welfare" (§ 33731 (a));[2]

2. "feasibility" (§ 33731 (b));

3. "economic soundness" (§33731 (b));

4. "best develop[ment] of the project area . . . [with] the least interference with the continued enjoyment of existing property rights" (§33732); and

5. "the continuance of existing buildings or uses whose demolition and rebuilding or change of use are not deemed essential to the redevelopment and rehabilitation of the area." (§§ 33013, 33275)

The code sections referred to, together with §§ 33700, 33711 and 33730, are quoted in the Appendix hereto. In applying these standards both the Agency and the Board of Supervisors held hearings and made investigations (§§ 33700, 33730, 33732) before making the findings required by §§ 33732 and 33733 and finally adopting, by ordinance, the plan as the official redevelopment plan for the project area. (§ 33733)

Appellants argue that "none of these Code sections mentions the word participation and hence cannot be primary standards." (Appellants' Statement as to Jurisdiction, pp. 17-18.) But this argument presents at most a question of statutory construction for the state courts, not a federal question.

---

[2]All section references herein are to the California Health and Safety Code.

In *Redevelopment Agency v. Hayes,* 122 C.A. 2d 777, 806-807, cert. den. 348 U.S. 987, the contention that the standards established by the Legislature were inadequate, was made and rejected. Likewise in *Berman v. Parker,* 348 U.S. 26, 35.

In the court below appellants relied upon the participation provisions of the Redevelopment Law, evidently recognizing that their constitutional rights "are satisfied when they receive that just compensation which the Fifth Amendment enacts as the price of the taking." (*Berman v. Parker,* 348 U.S. 26, 36.) Appellants' effort now to assail (and at the same time to rely upon) the participation provisions, flouts not only the rule that the claimed federal question must have been timely raised in the state court, but as well the rule that "One cannot, in the same proceeding, both assail a statute and rely upon it." (*Buck v. Kuykendall,* 267 U.S. 307, 316; *Hurley v. Commission of Fisheries,* 257 U.S. 223, 225; *Amer. Distilling Co. v. State Bd of Equalization,* 144 C.A. 2d 457, 465.)

---

3. CONSTITUTIONALITY OF THE CALIFORNIA COMMUNITY REDEVELOPMENT LAW AS APPLIED TO THE DIAMOND HEIGHTS REDEVELOPMENT PROJECT HAS PREVIOUSLY BEEN DETERMINED AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Appellants' contention that the California Community Redevelopment Law is unconstitutional as applied to vacant, nonslum-type blighted land in the

Diamond Heights Redevelopment Project is, as already noted, a point that has heretofore been litigated through the United States Supreme Court, and rejected. (*Redevelopment Agency v. Hayes*, 122 C.A. 2d 777, cert. den. 348 U.S. 987; cf. *Berman v. Parker*, 348 U.S. 26; *People v. City of Chicago*, 414 Ill. 600, 111 N.E. 2d 626.) The contention therefore presents no substantial federal question.

CONCLUSION.

Essentially appellants' contention is that the Agency unlawfully discriminated against them because, as permitted by the California Community Redevelopment Law, it let certain homeowners, the demolition of whose homes was not essential to the redevelopment, participate therein and did not allow appellants, whose unimproved land the Agency deemed essential thereto, to do so. The District Court of Appeal has held that appellants are free to set up in the eminent domain action this defense of discrimination as well as any other defenses they may have. The eminent domain action has been filed and appellants, in their answer thereto, have raised the defense of discrimination. That action has not come to trial.

For the reasons stated the appeal presents no substantial federal question.

Wherefore appellees pray that the appeal be dismissed, or, in the alternative, that the judgment be affirmed.

Dated, San Francisco, California,
September 20, 1958.

Respectfully submitted,

DION R. HOLM,
City Attorney of the City and County of San Francisco,
GEORGE E. BAGLIN,
Deputy City Attorney of the City and County of San Francisco,
Attorneys for Defendants and Appellees.

MORLEY GOLDBERG,
Deputy City Attorney of the City and County of San Francisco,
Of Counsel.

(Appendix Follows.)

Appendix

California Health & Safety Code, §§33700, 33711, 33730, 33731, 33732, 33733, 33013, and 33275 read:

"§33700. **Preparation by agency: Power to hold hearings: Other negotiations.** Each agency shall prepare or cause to be prepared, or adopt, a redevelopment plan for each project area and for that purpose may hold hearings and conduct examinations, investigations, and other negotiations."

"§33711. **Submission to legislative body.** Upon the formation or adoption of a redevelopment plan and its submission to the planning commission of the community, the agency shall submit it to the legislative body."

"§33730. **Matters to be considered by legislative body.** The legislative body shall consider the redevelopment plan of a project area submitted by the agency, any alternative plan submitted pursuant to this part, and all evidence and testimony for or against the adoption of the plans."

§33731. **Determination as to regularity, public peace, etc., economical soundness.** On the question of the adoption of any redevelopment plan, the legislative body shall determine:

"(a) Whether the plan would redevelop the area in conformity with this part and in the interests of the public peace, health, safety, and welfare.

(b) Whether the adoption and carrying out of the redevelopment plan is economically sound and feasible."

"§33732. **Alternative plans: Preference: Factors.** If alternative plans are submitted, the legislative body shall give preference to the plan which it deems will best redevelop the project area in conformity with the purposes and policy of this part and the master or general plan for the community and which requires the least interference with the continued enjoyment of existing property rights consistent with the purposes of this part."

"§33733. **Plan qualified for adoption: Ordinance: Majority.** If the legislative body determines that the redevelopment plan conforms to the master or general plan of the community, that it is economically sound and feasible, and that the carrying out of the plan would promote the public peace, health, safety, and welfare of the community and would effectuate the purposes and policy of this part, by ordinance adopted by a majority vote of all the members it may adopt the plan as the official redevelopment plan for the project area."

"§33013. **'Redevelopment': Continuance of certain existing buildings or uses.** 'Redevelopment' means the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all, or part of a redevelopment area, and the provision of such residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general

welfare, including recreational and other facilities incidental or appurtenant to them.

"It does not exclude the continuance of *existing buildings* or uses whose demolition and rebuilding or change of use are not deemed essential to the redevelopment and rehabilitation of the area. . . ."

"§33275. **Existing buildings to be continued on land: Owner's nonparticipation in redevelopment plan as justifying acquisition by agency.** Without the consent of the owner, an agency shall not acquire any real property on which *existing buildings* are to be continued on their present site and in their present form and use, unless they require alteration, improvement, modernization, or rehabilitation under the redevelopment plan and the owner fails or refuses to agree to participate in the redevelopment plan pursuant to Sections 33701 and 33745."